82-14

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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

MOXIE A. SHIRLEY and
WILMA C. SHIRLEY, Petitioners

v

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE

COURT OF APPEALS FOR THE SECOND CIRCUIT

Moxie A. Shirley and
Wilma C. Shirley
Petitioners Pro Se
Post Office Box 209
Rackerby, California
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QUESTIONS PRESENTED

I

Is the Small Business Administration exempt from the laws of Congress?

As the holder of a mortgage lien against a bankrupt's estate, is the Small Business Administration required to prove its claim and assert its lien in the Court of Bankruptcy?

Does Section 57 (n) of the Bankruptcy Act, Title 11 U. S. C. 93 (n), apply to the United States as a creditor with a provable claim?

Is the Small Business Administration, as the purchaser of a note and mortgage from a bank, required to abide by the terms of the note as agreed upon between the original lender and borrower?

II

Does Title 11 U.S.C. 32 (f) protect a bankrupt from action in any court other than the Bankruptcy Court to enforce a

claim?

Is a judgment obtained in another court null and void?

III

Can a trustee in bankruptcy act on a lien of mortgage which has been withheld from his jurisdiction?

Can a trustee in bankruptcy sell an interest in or title to an asset which was never brought into court for administration? Is a title manufactured from thin air valid?

In absence of any authority of the trustee to administer real property, does fee simple title remain in the bankrupt as owner?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

NO._____

MOXIE A. SHIRLEY and
WILMA C. SHIRLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Moxie A. Shirley and Wilma C. Shirley, Petitioners herein, pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, entered in the above-entitled matter on April 19, 1982.

OPINIONS BELOW

The opinion and affirmation of judgment of the Court of Appeals for the Second Circuit is unreported and is reproduced in Appendix A-I hereto.

The opinion of the United States District Court is reproduced in Appendix A-II hereto.

JURISDICTION

The judgment of the Court of Appeals (Appendix A-I) was entered on April 19, 1982. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the Small Business Administration, as the holder of a mortgage lien against a bankrupt's estate, is required to prove its claim and assert its lien in the Court of Bankruptcy.

a. Does Section 57 (n) of the

Bankruptcy Act, Title 11 U. S. C. 93/(n), apply to the United States as a creditor with a provable claim?

b. Is the Small Business Administration, as the purchaser of a note and mortgage from a bank, required to abide by the terms of the note as agreed upon between the original lender and borrower?

2. Whether Title 11 U. S. C. 32 (f) protects a bankrupt from action in any court other than the Bankruptcy Court to enforce a claim.

a. Is a judgment obtained in another court null and void?

3. Whether a trustee in bankruptcy can act on a lien of mortgage which has been withheld from his jurisdiction.

STATUTORY PROVISIONS INVOLVED

This case involves the Bankruptcy Act of 1936, Section 57 (n), Title 11 U. S. C. 93 (n), which provides as follows:

> (A)ll claims provable under this title, including all claims of the United States and of any State or any subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: Provided, however, That the court may, upon application before the expiration of such period and for cause shown grant a reasonable fixed extension of time for the filing of claims by the United States or any State or any subdivision thereof...

and Title 11 U. S. C. 32 (f):

> An order of discharge shall--(1) declare that any judgment theretofore or thereafter obtained in any other court is null and void...and (2) enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt.

STATEMENT OF THE CASE

This is a mortgage foreclosure action brought against Petitioners by the United States of America, on behalf of the Small Business Administration (hereinafter called the SBA), in the United States District

Court for the Northern District of New York. This action was commenced on October 10, 1978, four years after the filing of a petition in bankruptcy by Petitioners herein, and seven months after the closing of the estate in the court of bankruptcy. The SBA did not file its provable claim within the bar time required by Section 57 (n) of the Bankruptcy Act, and took no action whatsoever to assert its mortgage lien during the four years in which the estate was under the jurisdiction of the bankruptcy court. Nor did the trustee bring the mortgaged property into court and act upon it in the same manner and upon like terms as the claims of other creditors.

On May 2, 1968, Petitioners herein signed a promissory note to the Bank of Lake Placid, Lake Placid, New York, in return for a loan of $20,000. The note was secured by a mortgage covering real property

located in the County of Clinton, State of New York. The mortgage merely created a lien against the property, which, upon the filing of a petition in bankruptcy, became a provable claim. The terms of the Note expressly provided that:

> The Indebtedness shall immediately become due and payable, without notice or demand, upon...the filing of a petition by or against the undersigned...under the provisions of the Bankruptcy Act of 1898, as amended.

On September 15, 1969, prior to the due date, the Bank of Lake Placid sold the note and mortgage to the SBA. Petitioners continued to make payments to the SBA until September 1973. Shortly thereafter, with full knowledge of the SBA, preparations were being made by Petitioners and their attorney for the filing of a petition in bankruptcy, which precluded further payments to any creditors. Petition in bankruptcy was filed on February 4, 1974. The SBA was duly listed as a secured creditor with a

provable claim. The SBA did not participate in the bankruptcy proceedings in any way. They neither proved their claim nor released the mortgaged property for sale under the jurisdiction of the bankruptcy court. Petitioners' debts were discharged on July 16, 1975. The estate was closed in bankruptcy court on March 6, 1978, by order of Bankruptcy Judge Justin J. Mahoney.

Alleging default, the United States instituted action against Petitioners on October 10, 1978, demanding judgment to collect debt claimed due and owing in the amount of $28,143.89, together with interest at the rate of 6% per annum. Interest has continued to accrue until May 3, 1982, when the amount claimed due and owing was $36,214.78.

Petitioners were served with Summons and Complaint on April 6, 1979, and filed Answer on or about April 27, 1979, denying certain of the allegations and asserting

the affirmative defense of the time period within which the right of action must have accrued and failure to state a cause of action.

Respondent, United States of America, moved for summary judgment on December 10, 1979.

Petitioners filed Opposition to summary judgment on or about January 4, 1980, citing Section 57 (n) of the Bankruptcy Act as a bar to the action against them.

On August 5, 1981, the District Court for the Northern District of New York granted summary judgment in favor of United States of America.

Petitioner filed Notice of Appeal to the Second Circuit Court of Appeals on October 5, 1981. Brief was filed on November 16, 1981.

Scheduling order was mailed January 6, 1982, ordering appellee's brief to be filed by February 5, 1982.

Respondent (appellee) filed Motion for Summary Affirmance on or about January 4, 1982, arguing that the District Court correctly held that the time limitation for filing proofs of claim, Section 57 (n), does not apply to the United States as a secured creditor.

Petitioners filed Opposition to Motion for Summary Affirmance on or about January 16, 1982, arguing that the grant of jurisdiction over this action was expressly given by Congress to the bankruptcy court.

On February 10, 1982, the Court of Appeals ruled in favor of Petitioners and denied Respondent's Motion for Summary Affirmance.

On February 23, 1982, the Court of Appeals found the United States in default for failure to file its brief within the time ordered.

On February 26, 1982, the United States filed Motion for Leave to File

Motion Out of Time and For Permission to File Appellee's Brief. Motion was granted.

Petitioners filed Reply Brief and oral argument was heard on April 16, 1982, with Petitioners arguing and Respondent submitting.

On April 19, 1982, the Court of Appeals ruled in favor of the United States and affirmed the summary judgment of the District Court, holding that the United States was exempt from Section 57 (n) and, therefore, there was no material dispute.

THE RULINGS BELOW.

The District Court ruled, Gould v. McBride, 319 NYS 2d 125, 36 A.D. 2d 706, aff'd 36 NYS 2d 565 (1971), 29 NY 2d 768, that Petitioners' assertions in opposition to Respondent's motion for summary judgment did not effect SBA's lien on the mortgaged property, that there was no material dispute and thereby granted summary judgment in favor of Respondent.

The District Court also ruled that Section 57 (n) of the Bankruptcy Act did not apply to the United States, as holder of a lien of mortgage, Film (Felin) Associates, Inc. v. Rogers, 38 A.D. 2d 6, 326 NYS 2d 413; that Section 57 only affects the status of unsecured claims, Collier on Bankruptcy, 14th Ed., Vol 3, para. 57.27, p. 427; and that Petitioners' discharge in bankruptcy does not preclude foreclosure upon the lien now, even though the SBA remained silent during the bankruptcy proceedings, Prebyl v. Prudential In. Co. of America, 98 F 2d 199, 200 (8th Cir.) (construing Nebraska law).

The Court of Appeals affirmed the judgment of the District Court, holding that Section 57 deals with unsecured claims and does not apply to a holder of a valid secured lien, DeLaney v. City and County of Denver, 185 F 2d 246, 251 (10th Cir. 1950).

If Section 57 does not govern claims of the United States and does not govern

secured claims, where does it apply? What is the precise objective of the statute?

REASONS FOR GRANTING THE WRIT

The issue in this case is not whether or not Petitioners signed a promissory note in 1968, secured by a mortgage lien against certain real property, but whether or not the SBA, as holder of the note and mortgage, was required to assert its claim under the jurisdiction of the bankruptcy court, in accordance with the requirements of Title 11 U.S.C. 93 (Section 57 of the Bankruptcy Act), the General Orders of the Supreme Court; and whether or not failure to act within the proper jurisdiction renders the judgment of the District Court null and void, as guaranteed under Title 11 U. S. C. 32 (f), and ordered by Bankruptcy Judge Justin J. Mahoney in the Discharge of Bankrupt, July 16, 1975.

The cases in which the lower courts have determined Section 57 to be inapplicable to the instant case have been incorrectly

construed. They do not present the same legal problem; therefore, the application of stare decisis is not legally sound.

Petitioners argued the intent of the law by citing Pepper v. Litton, 1939, 308 U.S. 295, 41 Am. B. R. (N.S.) 279, 60 S.Ct. 238, 84 L. Ed. 281, in which, by way of dictum, in a footnote (308 U.S. p. 305, 41 Am. B.R. (N.S.) at p. 280, S. Ct. p. 244, 84 L. Ed. 281, the Supreme Court said:

> ...Congress has by express legislation given special recognition to the problem of claims by governmental bodies and has delimited by precise language the extent to which they may be favored...
>
> Specifically, the present statute makes the time limitation expressly applicable to the claims of the United States...
>
> It confers a favorable exception upon governmental claims by permitting the court to grant an application, made within the specified time limit, for a 'reasonable fixed extention'...

The Supreme Court went on to refer to the report of the Senate Committee which had the bill under consideration and quoted

3 Collier on Bankruptcy, 14th Ed., 116, footnote 35, as follows:

> In the Senate Report No. 1916 on H.R. 8046, 75th Cong., 3rd Sess. (1938) 5, it was said: "The House bill includes within the bar time for the proving of claims, all claims of the United States and of any State or subdivision thereof. The committee has both strengthened and extended this proposed amendment by providing, first, that such claims must actually be filed within the bar time, and, second, by permitting additional time for the filing of such claims upon application for cause shown. The committee agrees with the proposal that governmental claims should be subjected to the same requirements as other claims but is of the opinion that the limitation should be tempered by the provision for extension."

Petitioners' argument was ignored. The Courts below simply convicted Congress of a self-contradiction which the wording of the law does not warrant; transcended dictum of the Supreme Court with assertions contrary thereto; and exempted the United States and all secured claimants from a jurisdiction conferred by an Act of Congress.

It is inconveivable that the rulings of the Courts below could stand. The issue should be resolved by this Court in order to establish a binding precedent upon which future cases must lie.

Additional cause for certiorari lies in the conflict within the Court of Appeals on whether or not summary judgment should be affirmed.

The issue involves the jurisdiction of a court established by an Act of Congress and laws enacted pursuant thereto.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

June 15, 1982
Date

Moxie A. Shirley

Wilma C. Shirley

Moxie A. Shirley
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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of April, 1982.

PRESENT: HON. IRVING R. KAUFMAN,
HON. ELLSWORTH VAN GRAAFEILAND,
Circuit Judges,
HON. MARY JOHNSON LOWE,
District Judge sitting by designation.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MOXIE A. SHIRLEY and WILMA C. SHIRLEY, Defendants-Appellants.	81-6196

Filed April 19, 1982

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by appellants.

1. Appellants contend that section 57 of the Bankruptcy Act of 1939, 11 U.S.C. 93 (n) (1976), prohibits the Small Business Administration ("SBA") from asserting its mortgage lien against them at this time. Section 57 provides in pertinent part that: "(A)ll claims provable under this title, including all claims of the United States... which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed." The SBA did not file its claim within six months after the first meeting of creditors on June 4, 1974.

2. Section 57, however, is not applicable to the instant case. Courts have

long held that Sec. 57 deals with unsecured claims and does not apply to a holder of a valid secured lien. See DeLaney v. City and County of Denver, 185 F 2d 246, 251 (10th Cir. 1950). As a result, the SBA, as a creditor holding a valid lien, was not required to file a claim against a bankrupt debtor, but rather may rely solely upon its mortgage lien. See United States National Bank v. Chase National Bank, 331 U.S. 28 (1947). Accordingly, the SBA's failure to file a claim during the bankruptcy proceedings does not preclude it from acting on its claim now.

3. Moreover, the Shirley's interest in the property was sold by the bankruptcy trustee. Upon his appointment and qualification, title of the bankrupt's property vests in the trustee. 4A Collier on Bankruptcy, 70.04, at 49-50.2 (14th ed. 1978). If the trustee sells the property, and a court confirms the sale, title is conferred

on the purchaser. See In re Jamont, 453 F. Supp. 608, 609 (N.D.N.Y. 1978), aff'd 603 F. 2d 213 (2d Cir. 1979).

4. Here, the bankruptcy trustee sold and conveyed all right, title, and interest the Shirleys held in the mortgaged property to Harold and Edqard Billings. That sale was confirmed by the Bankruptcy Court in June, 1977. Thus, the Billingses gained all right and interest the Shirleys formerly had in the property, and the issues appellants seek to raise can only be properly advanced by the Billingses.

5. Appellants' other claims are equally without merit.

6. There was no material dispute that on May 2, 1968, a mortgage was given by Moxie Shirley as security for a promissory note executed that day. In addition, it is unchallenged that the Shirley defaulted on that note, and that its subsequent assignment to the SBA was valid. Since no

material issue was in dispute, Judge Munson properly granted the Government's motion for summary judgment.

s/ IRVING R. KAUFMAN

s/ ELLSWORTH VAN GRAAFEILAND
Circuit Judges,

s/ MARY JOHNSON LOWE
District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v. 78-CV-508

MOXIE A. SHIRLEY, WILMA C. SHIRLEY
NORTHERN INSURING AGENCY, INC.,
INDUSTRIAL COMMISSION OF NEW YORK
STATE, BANK OF LAKE PLACID, RELIANCE
INSURANCE CO., HAROLD BILLINGS, and
EDWARD BILLINGS,

Defendants.

APPEARANCES:

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HOWARD G. MUNSON, C.J.

MEMORANDUM-DECISION AND ORDER

This case comes before the Court on plaintiff's motion for summary judgment against defendants Moxie and Wilma Shirley on a mortgage foreclosure action pursuant

to 15 U.S.C. 634. The pertinent facts are as follows. On May 2, 1968, Moxie and Wilma Shirley executed and delivered a promissory note for $20,000 plus interest at 6% per annum to the Bank of Lake Placid. The note provided that upon default the entire balance, principle and interest would immediately become due. The note was secured by a mortgage given by Moxie Shirley on property located in the County of Clinton, State of New York. The United States of America, through its agent, the Small Business Administration (hereinafter SBA), guaranteed 90% of defendants' debt. After defendant failed to make the scheduled payments, the Bank of Lake Placid assigned its interest to SBA on September 15, 1969, in return for satisfaction of the guarantee. Between September 15, 1969 and September 26, 1973, some payments on the debt owed SBA were made by the defendants.

On February 4, 1974, Moxie and Wilma

Shirley filed petitions in bankruptcy. Their debts were discharged on July 16, 1975. During those bankruptcy proceedings, the mortgaged property was transferred by the Trustee in Bankruptcy to Harold and Edward Billings. SBA moved to foreclose on the mortgage on October 3, 1978. See New York Real Property Law 258, schedule n; Felazzo v. Riley, 278 N.Y. 289, 16 N.E. 2d 286 (1938). SBA moved for summary judgment against the Shirley on December 10, 1979, contending that no material issues of fact existed with regard to the execution of the note and mortgage, the default on the scheduled payments, and the assignment to SBA. See Gould v McBride, 319 NYS 2d 125, 36 A.D.2d 706, aff'd, 36 NYS 2d 565 (1971), 29 NY 2d 768.

In response to SBA's motion for summary judgment, defendants Moxie and Wilma Shirley have argued: first, that the note and mortgage were not executed on the date

as set forth in plaintiff's motion papers and Rule 10(e) statement; and second, that the action is time-barred due to SBA's failure to properly prove the claim during bankruptcy proceedings. The defendants also assert that even if the action is not time-barred, the competing claims of other creditors preclude foreclosure by SBA. Finally, defendants argue that the amount in question as computed by SBA is in excess of any possible debt. After careful consideration of the arguments and documentary evidence submitted by the parties, the Court concludes that there are no material facts in dispute, and that the Government must prevail on the instant motion against defendants Moxie and Wilma Shirley as a matter of law.

As to the defendants' first claims in opposition to the plaintiff's motion, it cannot be seriously disputed that the mortgage was executed on May 2, 1968. Defendants

denial of execution is based solely on an overly "careful" reading of the Government's motion papers and Rule 10(e) statement, where the date is mistakenly listed as "May 2, 1978." In view of the documents provided by the plaintiff it appears that this is most probably a typographical error. Consequently, no material issue of fact exists as to the actual date on which the defendants' mortgage was executed.

Defendants' second claim demands more particular attention as they seek to invoke Section 57 of the Bankruptcy Act of 1939 (11 U.S.C.93n) (1976). Section 57 reads, in pertinent part:

> (n) Except as otherwise provided in this title, all claims provable under this title, including all claims of the United States and of any State or any subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed.

Defendants contend that the failure to

prove the debt evidenced by the mortgage six months after the first meeting of creditors on June 4, 1974 prevents SBA from acting on its mortgage lien now.

Section 57 is not, however, applicable in this case. As holder of a lien of mortgage by valid assignment, the United States possesses the same secured interest as that held by the original mortgagor. (See Exhibit D, Complaint). Film Associated, Inc. v Rogers, 38 A.D. 2d 6, 326 NYS 2d 413 (1977). By contrast, Section 57 only affects the status of unsecured claims. Collier on Bankruptcy, 14th Ed., Vol 3, para. 57.27, p. 427. Consequently, the United States as a creditor holding a valid lien need not file a claim at all against a bankrupt debtor, but rather, may rely solely upon its mortgage lien. United States National Bank v. Chase National Bank, 331 U.S. 28, (1946); In re Pennyrich International Inc. of Dallas, 473 F 2d 417,

421 (5th Cir. 1973). Cf: In re Fried Furniture, 293 F. Supp. 92 (E.D.N.Y. 1968), aff'd, 407 F.2d 360 (2d Cir. 1969) (creditor's chattel mortgage effective against bankrupt even though no claim was proved during bankruptcy proceedings). Thus, the SBA's silence during the bankruptcy proceedings does not preclude it from acting upon its lien now.

Defendants' next argument, that their bankruptcy discharge in 1975 extinguishes the obligation created by the mortgage, is also insupportable. A mortgage is not synonomous with a note or bond indicating personal liability. On the contrary, a mortgage is a lien for its full amount on every portion of the land covered by the mortgage. In re New York (East River Park), 118 A.D. 509, 172 N.Y.S. 50 (1918), aff'd 226 N.Y. 640. In a foreclosure proceedings a mortgage holder moves to extinguish the equitable rights of the mortgager in the

named parcel of land. Harlem Savings Bank v. Cooper, 54 Misc., 101 N.Y.S. 2d 641 (1950). The personal liability of the debtor is not a necessary part of the right to foreclosure. Baker v. Reconstruction Finance Corp., 109 F2d 336, 338 (5th Cir. 1940); 59 C.J.S. Mortgages 482, 492 (1949). Where a debt is secured by a lien of a mortgage, a bankruptcy discharge severs only the debt, it does not constitute a release from the lien. Prebyl v. Prudential Ins. Co. of America, 98 F2d 199, 200 (8th Cir.) (construing Nebraska law), cert. denied, 305 U.S. 641 (1938); Application of Halpern, 54 Misc. 541, 283 N.Y.S. 2d 89 (1967); 8B C.J.S. Bankruptcy 583 (2) (1949). Cf In re Vanity Slippers, 4 F Supp. 82 (S.D.N.Y. 1938) (holders of chattel mortgage retained right to proceeds from sale of goods named in mortgage even after bankruptcy). Therefore, defendants' 1975 discharge in bankruptcy does not

preclude foreclosure upon the lien held by the plaintiff.

Defendants' final two contentions, that SBA's right to foreclose is affected by competing claims and that the mortgage debt has been incorrectly calculated, are irrelevant to the instant dispute between SBA and Moxie and Wilma Shirley. Although it seems clear that SBA is the holder of the senior mortgage and would therefore have priority over later claimants, Meyer v. U.S., 375 U.S. 233, 236 (1963); Rivera v. Hellman, 45 Misc. 2d 891, 258 N.Y.S. 2d 25 (1965), that ultimate determination would be one made between the competing creditors. For the moment the sole issue before the Court is whether summary judgment is appropriate as against the defendants named here. Similarly, the contention that the debt as quoted by SBA is incorrect does not affect the merits of SBA's claim against the mortgaged property. Assuming

for the moment SBA succeeds in selling the property described in the mortgage and realizes either less or more than the face amount of the lien, defendants have neither a responsibility to make up the balance or an entitlement to any surplus since their rights to the land are extinguished. In any event, the amount permissibly collectable by SBA is properly determined when and if a motion for judicial sale is made.

In conclusion, there is no material dispute that on May 2, 1968, a mortgage was given by defendant Moxie Shirley as security for a promissory note executed on the same day. It is uncontroverted that default on that debt occurred where scheduled payments were not made by the defendants and that the subsequent assignment of the mortgage and note to SBA was valid. Having shown that defendants' assertions in opposition to this motion do not effect SBA's lien on the property described in

the mortgage, plaintiff's motion for summary judgment is hereby granted. Gould v. McBride, supra.

IT IS SO ORDERED.

Dated: August 5, 1981
Syracuse, New York

Howard G. Munson
Chief U.S. District Judge